IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 944 OF 2005

Smt. Laxmibai Narayan Dhongade ...Petitioner

Versus

Suresh Shantaram Mahadik & Ors. ...Respondents

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Mr. Shailesh Lele with Mr. Rajiv Patil counsel for Petitioner

Mr. S.S. Patwardhan, counsel for Respondents 1 & 2.

Mr. Anand Kulkarni, counsel for Respondents 3 & 4.

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CORAM: B. H. MARLAPALLE, J.

DATED: 5TH MAY, 2005

P. C.:-

1. Heard Mr. Lele h/f Mr. Rajiv Patil, the learned counsel for the petitioner and Mrs. Patwardhan for respondent Nos. 1 and 2 and Mr. Kulkarni with Mr. Anand Kulkarni, the learned counsel for the respondent Nos. 3 and 4.

2. Rule. The respondents waive service. Rule is taken up for final hearing forthwith.

3. The petitioner has filed Regular Civil Suit No. 85 of 2004 for permanent injunction and declaration and in the said suit she also filed an application at

Exh.5 for temporary injunction. She claims that the house No. 23 belongs to her and the area of the total plot is 85 Sq. Ft. X 37 Sq. Ft., thus, the total area is 3122 Sq. Fts. She alleged that the Nandgaon Village Panchayat has undertaken the construction of its building in the neighbouring plot and in the said construction the respondents have encroached upon her land/plot. While the application for temporary injunction is pending, she applied for appointment of Court Commissioner vide her application at Exh.34. This application has been rejected by the impugned order dated 7.2.2005.

4. The respondents have filed reply before the trial court and have denied the allegations of encroachment. It has been further contended by them that the proposed office building of the village panchayat is being constructed as per the permission granted by the competent authority who had also examined the issue of encroachment. The respondents further claimed that in the suit house the petitioner does not stay and her name was struck down from the records of village panchayat from 1994 onwards. The existence of the house has been denied and the respondents claimed that some collapsed structure is standing on some portion of the suit plot but in any case the village panchayat has not encroached upon the petitioner’s property. The application for

appointment of Court Commissioner was opposed by the respondents on the sole ground that such exercise would amount to the plaintiff being allowed to collect the evidence and the trial court has accepted the said objection.

5. The record that was produced before this Court by the learned counsel for the respondent Nos. 1 and 2 shows that the petitioner has her property i.e. house No.23 and she has paid tax for some time. As per the said record in the year 1994 her name has been removed on account of non payment of tax. This action of the village panchayat by itself would not take away the right of the petitioner on the suit house and the suit property cannot be considered to be a public property. The respondents being a public body, it is expected that it would not encroach upon any of the citizen’s property. If the appointment of the Court Commissioner is not allowed there would be no evidence before the trial court for deciding the application at Exh.5 and after its rejection the village Panchayat would proceed with the construction of its office. Surely the plaintiff has a right to apply for the appointment of Court Commissioner after the application at Exh.5 is decided and if ultimately in the evidence it is found that the office building has been constructed by way of encroachment of some portion of the property not only the plaintiff but in

fact the defendant, a public body would also suffer loss. The village Panchayat being a public body must protect the interests of the citizens first and therefore, it is not proper for it to oppose the appointment of Court Commissioner. No prejudice is likely to be caused to the panchayat if the Court Commissioner is appointed even before the application for temporary injunction is decided. This is a fit case where the general rule, that the appointment of Court Commissioner in collecting the evidence should not be allowed needs to be made exception and more so the defendants being a public body which is constructed the panchayat office from public funds.

6. Hence, the petition succeeds and the impugned order is hereby quashed and set aside and the application for appointment of Court Commissioner is hereby allowed.

7. Rule made absolute with no order as to costs.

8. With to go forthwith to the trial court.

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